UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN FLEISHER, as trustee of the Michael Moss Irrevocable Life Insurance Trust II, and JONATHAN BERCK, as trustee of the John L. Loeb, Jr. Insurance Trust, on behalf of themselves and all others similarly situated, Plaintiffs, vs. PHOENIX LIFE INSURANCE COMPANY, Defendant.	ECF Case Case No. 11 Civ. 8405 (CM) (JCF)

DEFENDANT PHOENIX LIFE INSURANCE COMPANY'S MEMORANDUM OF LAW OPPOSING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

DORSEY & WHITNEY LLP
51 West 52nd Street
New York, New York 10019
(212) 415-9200

JORDEN BURT LLP
1025 Thomas Jefferson Street NW
Suite 400 East
Washington, DC 20007
(202) 965-8100

Attorneys for Defendant
Phoenix Life Insurance Company

Dated: New York, New York
February 1, 2013

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 2

I. Phoenix's Cost Of Insurance Rate Adjustments And Rate Replacement 2

II. The Trustees' Allegations And Proposed Classes 5

ARGUMENT 7

I. The Legal Standard For Class Certification Is Rigorous 7

II. The Class Definitions Include Many Putative Class Members Who Suffered No Redressable Injury Traceable To Phoenix's Cost Of Insurance Rate Adjustments 8

III. The Rule 23(b)(3) Criteria Are Not Met 9

A. Individualized Questions Of Law And Fact Predominate 9

B. A Class Action Is An Inferior Means Of Adjudicating The Controversy 15

IV. The Rule 23(a) Criteria Are Not Met 19

A. Serious Intraclass Conflicts Render The Named Plaintiffs Neither Typical Of Putative Class Members Nor Adequate To Represent Them 19

B. Joinder Of The Two Proposed Classes' Members Is Not Impracticable 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Page(s)**

Abrams v. Interco Inc.,
719 F.2d 23 (2d Cir. 1983) 15

Abu Dhabi Commercial Bank v. Morgan Stanley & Co.,
269 F.R.D. 252 (S.D.N.Y. 2010) 23

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 21

Ansari v. New York University,
179 F.R.D. 112 (S.D.N.Y. 1998) 24

In re Aqua Dots Products Liability Litigation,
654 F.3d 748 (7th Cir. 2011) 9

Avritt v. Reliastar Life Insurance Co.,
615 F.3d 1023 (8th Cir. 2010) 8

Bell Atlantic Corp. v. AT&T Corp.,
339 F.3d 294 (5th Cir. 2003) 15

Block v. First Blood Associates,
691 F. Supp. 685 (S.D.N.Y. 1988) 23

Blyden v. Mancusi,
186 F.3d 252 (2d Cir. 1999) 18

In re Conseco Life Insurance Co. Cost of Insurance Litigation,
No. 04 ML 1610, 2005 WL 5678842 (C.D. Cal. Apr. 26, 2005) 22

In re Conseco Life Insurance Co. LifeTrend Insurance Sales & Marketing Litigation,
270 F.R.D. 521 (N.D. Cal. 2010) 22

Califano v. Yamasaki,
442 U.S. 682 (1979) 7

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 18

Comcast Corp. v. Behrend,
133 S. Ct. 24 (2012) 15

Continental Casualty Co. v. Employers Insurance Co. of Wausau,
16 Misc. 3d 223, 839 N.Y.S.2d 403 (N.Y. Sup. Ct. 2007)....................12

Deen v. New School University,
No. 05 Civ. 7174, 2008 WL 331366 (S.D.N.Y. Feb. 4, 2008)....................23, 24

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006)....................8

Dowd v. Alliance Mortgage Co.,
74 A.D.3d 867, 903 N.Y.S.2d 104 (2d Dep't 2010)....................11, 13

Duchardt v. Midland National Life Insurance Co.,
265 F.R.D. 436 (S.D. Iowa 2009)....................22

Dunnigan v. Metropolitan Life Insurance Co.,
214 F.R.D. 125 (S.D.N.Y. 2003)....................17, 19

Eisen v. Carlisle & Jacquelin,
391 F.2d 555 (2d Cir. 1968)....................16

Feinstein v. Firestone Tire & Rubber Co.,
535 F. Supp. 595 (S.D.N.Y. 1982)....................14

General Telephone Co. of Northwest v. EEOC,
446 U.S. 318 (1980)....................23

General Telephone Co. of Southwest v. Falcon,
457 U.S. 147 (1982)....................21

In re IPO Securities Litigation,
471 F.3d 24 (2d Cir. 2006)....................7, 11

Kottler v. Deutsche Bank AG,
No. 05 Civ. 7773, 2010 WL 1221809 (S.D.N.Y. Mar. 29, 2010)....................16

Maywalt v. Parker & Parsley Petroleum Co.,
67 F.3d 1072 (2d Cir. 1995)....................21

McLaughlin v. American Tobacco Co.,
522 F.3d 215 (2d Cir. 2008)....................12, 14

In re Minnesota Mutual Life Insurance Co. Sales Practices Litigation,
346 F.3d 830 (8th Cir. 2003)....................16

Moore v. PaineWebber, Inc.,
306 F.3d 1247 (2d Cir. 2002) 10

Myers v. Hertz Corp.,
624 F.3d 537 (2d Cir. 2010) 7, 12

New Jersey Carpenters Health Fund v. Rali Series 2006-QO1 Trust,
477 F. App'x 809 (2d Cir. 2012) 12

Primavera Familienstiftung v. Askin,
178 F.R.D. 405 (S.D.N.Y. 1998) 23, 24

Reno v. Catholic Social Services, Inc.,
509 U.S. 43 (1993) 8

Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.,
601 F.3d 1159 (11th Cir. 2010) 13

Spagnola v. Chubb Corp.,
264 F.R.D. 76 (S.D.N.Y. 2010) 10, 13, 19

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 9

Steinmetz v. Bache & Co.,
71 F.R.D. 202 (S.D.N.Y. 1976) 16

Stoudt v. E.F. Hutton & Co.,
121 F.R.D. 36 (S.D.N.Y. 1988) 16

Thao v. Midland National Life Insurance Co.,
No. 09 Civ. 1158, 2012 WL 119871 (E.D. Wis. Jan. 9, 2013) 21

Thao v. Midland National Life Insurance Co.,
No. 09 Civ. 1158, 2012 WL 1900114 (E.D. Wis. May 24, 2012) 21

U.S. Bank N.A. v. PHL Variable Insurance Co.,
No. 12 Civ. 6811, 2012 WL 6200634 (S.D.N.Y. Dec. 10, 2012) 11, 13

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 7, 10

Weiss v. La Suisse,
226 F.R.D. 446 (S.D.N.Y. 2005) 13, 18, 24

Weiss v. La Suisse,
381 F. Supp. 2d 334 (S.D.N.Y. 2005) 17

Rules

Fed. R. Civ. P. 23 .... *passim*

Miscellaneous

Dan Zollars *et al.*, *The Art of the Deal: Pricing Life Settlements*, Contingencies, Jan.-Feb. 2003, *available at* http://www.contingencies.org/janfeb03/art.pdf 14

5 James Wm. Moore *et al.*, *Moore's Federal Practice* (3d ed. 2012) 18

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 10

U.S. Gov't Accountability Office, GAO-10-775, *Life Insurance Settlements: Regulatory Inconsistencies May Pose a Number of Challenges* (2010), *available at* http://www.gao.gov/new.items/d10775.pdf 6

U.S. Secs. & Exchange Comm'n, *Life Settlement Task Force Staff Report* (2010), *available at* http://www.sec.gov/news/studies/2010/lifesettlements-report.pdf 7

PRELIMINARY STATEMENT

Plaintiffs Jonathan Berck, as trustee of the John L. Loeb Jr. Insurance Trust, and Martin Fleisher, as trustee of the Michael Moss Irrevocable Life Insurance Trust II ("the Trustees") propose to represent two classes against Phoenix Life Insurance Company ("Phoenix"): a class of universal life insurance policyowners "subjected to" Phoenix's cost of insurance ("COI") rate adjustment implemented beginning in 2010, and a separate class of policyowners holding a different group of policies "subjected to" a second COI rate adjustment implemented beginning in 2011. This lawsuit, however, is not appropriate for class treatment. Consider:

First, both proposed classes violate this Circuit's rule against certifying classes that contain unnamed class members which would lack standing to sue individually. In November 2011, Phoenix's first COI rate adjustment was reversed and followed by a replacement COI rate adjustment [redacted] the legality of which is not challenged in this suit. Many policyowners thus lack a redressable injury traceable to a rate adjustment, whether because they were made whole by Phoenix's reversal of the first COI rate adjustment or, with respect to policyowners in both proposed classes, because their policies either lapsed, cancelled, were surrendered or, with respect to the 2010 rate change, accumulated a sufficient cash value before any increased COI rate became effective.

Second, individualized questions swamp any questions that may be subject to generalized proof, destroying Rule 23(b)(3)'s predominance requirement. Policyowners' acquisition of policies with foreknowledge of the COI rate adjustments; their continued payments of premiums without objection; their investment decisions to enjoy the policies' guaranteed minimum interest rates and tax advantages; and their retention of the benefits of the insurance, all support

Phoenix's individualized acquiescence-based defenses. Likewise, the Trustees offer no evidence that their claims for lost profits are capable of formulaic determination.

Third, the class device is an inferior, not superior, means of adjudication here, failing Rule 23(b)(3)'s superiority requirement. The proposed classes include financial institutions, life settlement investors, or their nominees which assert large claims and possess the resources to pursue their own claims. Moreover, superiority is lacking where, as here, there is no glut of litigation to manage and individual trials are desirable.

Fourth, irreconcilable intraclass conflicts riddle the proposed classes, leaving unmet Rule 23(a)'s adequacy and typicality requirements. COI rate lawsuits are ill-suited to class treatment when many policyowners would prefer the life insurer's current rates and interpretation of the policies' COI rate provisions to a revised rate consistent with the class representatives' interpretation. A judgment for the Trustees invites the creation of "winners" and "losers" within the proposed classes, as demonstrated, by way of example, by comparing the impact on affected policyowners of the replacement COI rate adjustment to the 2010 rate adjustment it replaced.

Fifth, the numerosity requirement is not met. Joinder is practicable inasmuch as the two proposed classes, numbering approximately 58 and 72 putative members, respectively, are comprised of financially motivated policyowners.

FACTUAL BACKGROUND[1]

I. Phoenix's Cost Of Insurance Rate Adjustments And Rate Replacement.

The PAUL Policies. This suit involves certain policies issued in different series of univeral life insurance products, referred to as Phoenix Accumulator Universal Life ("PAUL")

[1] The relevant background and facts are set forth in the accompanying Declaration of Gina Collopy O'Connell dated February 1, 2013 ("O'Connell Decl."), the Declaration of Douglas A. French dated February 1, 2013 ("French Decl."), and the exhibits to the Declaration of Brian P. Perryman dated February 1, 2013 ("Perryman Decl."). They are summarized here.

insurance policies. Pls.' Memo. at 5. Although each product series' terms differ, the policies' general operation is similar. Premiums are added to the policy value after Phoenix deducts any applicable premium sales charge. O'Connell Decl. ¶ 4. On a monthly basis, the company deducts from the policy value certain charges, including COI, the cost of any benefit riders, and other monthly charges. *Id.* ¶ 5. Also on a monthly basis, interest is credited to the policy value at a declared rate subject to a guaranteed minimum 4% effective annual rate. *Id.* ¶¶ 5, 6. Interest accrues on a tax deferred basis, subject to applicable tax regulations. French Decl. ¶ 16. In addition to the accumulated cash value, a death benefit is provided. O'Connell Decl. ¶ 3.

The 2010 COI Rate Adjustment. The policies' terms permit Phoenix to periodically revise its COI rates, subject to the guarantee that the rates will never be higher than the maximum provided in each policy's schedule pages. *Id.* ¶¶ 7, 8. In 2009, [redacted] *Id.* ¶¶ 9, 10. As a result, effective on policy anniversaries on or after April 1, 2010, Phoenix increased the current COI rate on 124 policies [redacted] *Id.* ¶ 11. The company gave advance written notice to affected policyowners, and provided illustrations and answered questions upon request. *Id.* ¶ 14. This group included the Loeb Trust. Compl. ¶ 12.

Under this 2010 rate adjustment, [redacted]

O'Connell Decl. ¶ 15. The Loeb Trust claims [redacted] Berck Decl. ¶ 5.

The 2012 Replacement COI Rate Adjustment. In May 2010, representatives from Phoenix and the Department [redacted] O'Connell Decl. ¶ 24. [redacted] *Id.* Ultimately, the Department [redacted] *Id.* ¶ 25. [redacted] *Id.* ¶ 26; *see also id.* Exs. A-C. Specifically, on November 16, 2011, the Department wrote to [redacted] *Id.* [redacted] *Id.*

Under the replacement plan, [redacted] *Id.* ¶ 29. [redacted] *Id.* [redacted]

[redacted] *Id.* ¶ 30. [redacted] *Id.* ¶ 31.

The replacement rate adjustment [redacted] *Id.* ¶ 33. [redacted] *Id.*

The 2011 COI Rate Adjustment. Based on [redacted] – in fall 2011 Phoenix revised its current COI rates for a separate group of policies in later-issued PAUL product series, [redacted] *Id.* ¶¶ 34, 35. [redacted] *Id.* ¶ 38. Of these policies, 87 received a COI rate increase, while 17 received a rate decrease. *Id.* Policyowners were notified in late September 2011, with the rate changes effective with each policy's anniversary on or after November 1, 2011. *Id.* ¶ 39. This group included the Moss Trust. Compl. ¶ 13.

On August 24, 2011, Phoenix [redacted] *See* O'Connell Decl. Ex. D. On September 29, 2011, the Department wrote to advise that [redacted] *Id.* Ex. E.

II. The Trustees' Allegations And Proposed Classes.

This suit was filed on November 18, 2011. The Complaint posits that Phoenix's first (2010) and second (2011) COI rate adjustments breached the policies' terms (1) "by increasing

COI rates based on a policy's accumulated policy value because accumulated policy value is not one of the permissible and enumerated bases for increasing cost of insurance rates"; (2) "because Phoenix's COI rate increases were not based on the permissible factors stated in the policies, such as Phoenix's expectations of future mortality and persistency"; (3) "because the COI rates are not 'based on the Insured's age at issue, risk class and sex, and on policy duration'"; (4) "by increasing the COI rates on bases that do not apply uniformly to a class of insureds"; (5) "because its COI increases were designed to recoup past losses"; and (6) "by decreasing credited interest rates on a discriminatory basis and not on the basis of any of the permitted, enumerated factors set forth in the policies." Compl. ¶ 47. The Trustees seek to certify two separate classes of policyowners "subjected to" the first and second rate increases, respectively. *Id.* ¶¶ 36, 37.

In their moving papers, the Trustees do not advance an argument for certification of a claim based on allegations about the interest Phoenix credited to the policies' cash value (item 6, *supra*). Insofar as their moving papers focus solely on the COI rate adjustments, the credited interest rate claim appears to be abandoned. In addition, the Trustees concede that [redacted] Pls.' Opp. to Mot. to Dismiss at 8 n.1.

The Trustees aver that the 2010 and 2011 COI rate adjustments are "targeted" at "life settlement investors, or trustees with known connections with life settlement investors" and "policies procured through certain brokers (*e.g.*, those with connections to the life settlement market)." Compl. ¶ 33. The life settlement market "is organized largely as an informal network of specialized intermediaries that facilitate the sale of existing life insurance policies by their owners to third-party investors." U.S. Gov't Accountability Office, GAO-10-775, *Life Insurance Settlements: Regulatory Inconsistencies May Pose a Number of Challenges* 4 (2010), *available* *at* http://www.gao.gov/new.items/d10775.pdf. "Individuals and financial institutions, including some banks, hedge funds, and life insurance companies, have invested in life settlements by buying individual policies, fractionalized interests in individual policies, interests in pools of policies, or other products." *Id.* Indeed, "the majority of investors in today's life settlements markets are large institutional investors looking to acquire pools of policies." U.S. Secs. & Exchange Comm'n, *Life Settlement Task Force Staff Report* 6 (2010), *available at* http://www.sec.gov/news/studies/2010/lifesettlements-report.pdf. Many institutional entities currently own the policies subject to Phoenix's COI rate adjustments. O'Connell Decl. ¶ 45.

ARGUMENT

I. The Legal Standard For Class Certification Is Rigorous.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)). "The party seeking class certification bears the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements has been met." *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010).

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2551. Certification is proper only if the Court is satisfied, after a "rigorous analysis," that Rule 23's prerequisites have been satisfied. *Id.* "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* The Court "must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *In re IPO Secs. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

II. The Class Definitions Include Many Putative Class Members Who Suffered No Redressable Injury Traceable To Phoenix's Cost Of Insurance Rate Adjustments.

The Trustees' effort at class certification initially fails because both proposed classes are populated by policyowners which suffered no injury by reason of the COI rate adjustments and, even if they had, their injuries would not be redressed by a judgment that Phoenix breached the policies. In short, many putative class members lack Article III standing.

"To meet the Article III standing requirement, a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006). "The filing of suit as a class action does not relax this jurisdictional requirement." *Id.* In other words, "no class may be certified that contains members lacking Article III standing." *Id.* at 264. "The class must therefore be defined in such a way that anyone within it would have standing." *Id.*; *see also Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 66-67 (1993) (unnamed class members lacked ripe claims); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (unnamed class members lacked standing).

The two classes proposed here are not so defined. They include any PAUL policyowner "subjected to" the rate adjustments, Compl. ¶¶ 36, 37, regardless of whether the policyowner:

- Was returned to the *status quo ex ante* by reason of the reversal of the first rate adjustment – all 124 policies in the first rate adjustment class, O'Connell Decl. ¶¶ 29-31;
- Lapsed, cancelled, or surrendered the policy, or the insured died, before the COI rate adjustment became effective – 16 policies (out of 124) in the first rate adjustment class; 23 policies (out of 104) in the second rate adjustment class, *id.* ¶¶ 18, 42;
- Did not pay any increased COI charge because their policy's cash value was already sufficient, without additional premiums, to avoid the COI increase at the time the first rate adjustment became effective – approximately 15 policies, *id.* ¶ 17;
- [redacted] *id.* ¶ 19; or
- Enjoyed a rate *decrease* because of the second rate adjustment – 17 policies, *id.* ¶ 38.

Plainly, policyowners that never paid an increased COI charge at all, or which had the difference of an increased COI rate fully refunded to them, with credited interest, have suffered no discernable injury.[2] Equally plainly, a judgment that Phoenix breached its policies' terms and an attendant award of damages will not redress any injury that Phoenix itself has not already redressed. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Nor do policyowners even have a justifiable fear of a future rate adjustment using the first adjustment's methodology if, as the Trustees assert, the Department has already [redacted] Pls.' Memo. at 1, and [redacted]

In their moving papers, the Trustees assert for the first time – without evidence, record citation, or explanation – that with respect to the first COI rate adjustment's reversal, "Phoenix has not adequately compensated the affected policyholders for the damages they suffered while the increase was in effect." *Id.* at 9. That is simply untrue. The policies affected by the first COI rate increase were made whole by reason of that increase's reversal. *See* O'Connell Decl. ¶¶ 29-31. The Trustees fail to identify *any* factually supported basis for asserting otherwise.

III. The Rule 23(b)(3) Criteria Are Not Met.

A. Individualized Questions Of Law And Fact Predominate.

Even if the classes were not improperly defined to include policyowners without Article III standing, the Trustees separately fail to meet Rule 23(b)(3)'s predominance and superiority requirements. "The predominance requirement is much more stringent than the commonality requirement under Rule 23(a) and requires that common questions be the focus of the litigation." *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 98 (S.D.N.Y. 2010). A mere "common course of conduct" is "not enough to show predominance, because a common course of conduct is not sufficient to establish liability of the defendant to any particular plaintiff." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002). Thus, "breach of contract claims certainly can be appropriate for class treatment, *but only where they are subject to generalized proof.*" *Spagnola*, 264 F.R.D. at 98 (emphasis added). That is not the case here.

---

[2] The first rate adjustment's reversal transcends Article III standing concerns, implicating Rule 23(a)(4)'s "adequacy" requirement. Class representatives who "want relief that duplicates a remedy that most buyers already have received" are really proposing "that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer" and are therefore "not adequately protecting the class members' interests." *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

The Trustees are content to rest on the surface: this suit raises the common question of whether Phoenix breached its policies in implementing COI rate adjustments. But "'[w]hat matters to class certification is not the raising of common questions – even in droves'"; what matters is "'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Dukes*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Even assuming common proof of breach can be offered, ultimate liability and damages cannot be resolved "in one stroke," *id.*, across the putative classes without resolving numerous individualized issues – including questions of standing and class membership, class member-specific affirmative defenses, and the complexity of ascertaining policyowners' claims for the diminished "resale value" of their PAUL policies – making it "impossible to say that examination of all the class members' claims for relief will produce a common answer." *Id.* at 2552.

Class Member Standing. As shown in Part II, *supra*, many putative class members have suffered no discernable injury, certainly no injury that Phoenix has not already redressed. The Trustees may nonetheless speculate that *some* policyowners (*viz.*, Mr. Berck) were injured by [redacted] *See* Berck Decl. ¶ 5. Aside from this underscoring that Mr. Berck himself did not suffer a COI rate increase, most policyowners [redacted] it is plausible that, [redacted] "Obviously, ascertaining each purchaser's intent would require an individualized determination." *IPO*, 471 F.3d at 44. This "need for numerous individualized determinations of class membership" and standing supports the conclusion "that individual questions will permeate this litigation." *Id.* at 45; *see also* French Decl. ¶¶ 42-44.[3]

Individualized Defenses. Phoenix will assert multiple acquiescence-based defenses – waiver, ratification, voluntary payment doctrine – against many putative class members' claims based upon those members' varying circumstances, necessitating a series of mini-trials. Where, as here, a contracting party knows of another party's purported breach but continues to perform under and accepts the contract's benefits, such performance and acceptance waives or ratifies the breach. *U.S. Bank N.A. v. PHL Variable Ins. Co.*, No. 12 Civ. 6811, 2012 WL 6200634, at *3 (S.D.N.Y. Dec. 10, 2012). Likewise, the voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts. *Dowd v. Alliance Mortg. Co.*, 74 A.D.3d 867, 869, 903 N.Y.S.2d 104 (2d Dep't 2010).

---

[3] Mr. Berck *claims* [redacted] For the year the 2010 rate adjustment became effective, the Loeb Trust [redacted] O'Connell Decl. ¶ 16. At a minimum, Mr. Berck's own investment strategy is not illustrative of any other policyowner's, and there are doubtless numerous similar disputed factual issues across the proposed classes.

Putative class members have acquiesced to the COI rate adjustments in several ways. For example, many policyowners – if not most – have waived or ratified the purported breaches by paying without objection the premiums on their policies while, at the same time, receiving the benefits of (1) insurance coverage, especially including any death benefits paid by now or by the time of a judgment herein; and (2) the policies' 4% guaranteed minimum interest rate. In addition, policyowners which acquired interests in their PAUL policies *after* the rate adjustments were announced, and which nonetheless paid the increased COI rate, have likewise acquiesced in the purported breaches. A number of policies fall within this latter category; that number may grow as ownership interests in the policies continue to be transferred to new policyowners. O'Connell Decl. ¶¶ 21, 43. These defenses render relevant the circumstances of each class member's acquisition, intentions, and understandings, including the class member's awareness of the rate adjustment and reasons for continued payments to Phoenix. *See Cont'l Cas. Co. v. Employers Ins. Co. of Wausau*, 16 Misc. 3d 223, 237, 839 N.Y.S.2d 403 (N.Y. Sup. Ct. 2007) (waiver and ratification "are based upon the individual actions of the party against whom the defenses are asserted, and the circumstances supporting such defenses all arise outside the terms of the policy"), *rev'd on other grounds*, 60 A.D.3d 128, 871 N.Y.S.2d 48 (1st Dep't 2008).

While "the existence of a defense potentially implicating different class members differently does not *necessarily* defeat class certification," the Court nonetheless "must consider potential defenses in assessing the predominance requirement." *Myers*, 624 F.3d at 551; *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 233 (2d Cir. 2008) (same). Where, as here, highly individualized evidence will be offered to show what most putative class members knew and intended, any common questions will no longer predominate. *See, e.g., N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Trust*, 477 F. App'x 809, 813 (2d Cir. 2012) (affirming denial of class certification; proving affirmative defense based upon class members' knowledge "would require many individualized inquiries, outweighing the common issues in the case"); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1177-79 (11th Cir. 2010) (reversing class certification where waiver and ratification defenses to claim for contract breach predominated); *Spagnola*, 264 F.R.D. at 98-99 (application of voluntary payment doctrine precluded class certification of claim for contract breach).[4]

Nor is Phoenix's assertion of its acquiescence-based defenses speculative – Phoenix *will* assert these defenses. For example, within the first COI rate adjustment class, four PAUL policies were acquired by putative class member U.S. Bank N.A., as securities intermediary for Lima Acquisition L.P., O'Connell Decl. ¶ 23, through a life settlement portfolio acquisition in December 2010, months *after* that rate adjustment was announced. *See* Perryman Decl. Ex. A. U.S. Bank and Lima were fully aware of the COI rate adjustment at the time of acquisition, even acknowledging that the PAUL "policy language is broad and seems to give PHX the right to increase." *See id.* Ex. B. This was the *same* portfolio acquisition by which U.S. Bank acquired the policies at issue in the COI rate adjustment lawsuit against Phoenix's affiliate, *U.S. Bank N.A. v. PHL Variable Insurance Co.*, No. 12 Civ. 6811. There, Magistrate Judge Francis has held that the plaintiff's foreknowledge bears on acquiescence-based defenses:

> The circumstances surrounding the plaintiff's acquisition of the policies are relevant to PHL's potential defenses. The plaintiff's primary allegation is that PHL breached the terms of its policies by raising the cost of insurance rates and engaged in deceptive marketing practices. One of the ways that PHL can defend against this action is by establishing that U.S. Bank had foreknowledge of this alleged breach at the time it acquired the policies and yet acquired the policies,

[4] *See also Weiss v. La Suisse*, 226 F.R.D. 446, 454 (S.D.N.Y. 2005) (declining to certify claim for contract breach where defenses could include noncompliance with contract provisions "by various plaintiffs in various ways"); *Dowd*, 74 A.D.3d at 869 (reversing class certification "since an affirmative defense based on the voluntary payment doctrine ... necessitates individual inquiries of class members").

> continued to pay premiums on them, and accepted benefits of the policies, thereby acquiescing to and waiving the alleged breach.

2012 WL 6200634, at *3. That analysis applies equally to the policies held by U.S. Bank at issue in this putative class action, and to any similarly-acquired policies held by other policyowners in both of the proposed first and second COI rate adjustment classes.

Existence and Calculation of Complex Damages. The Trustees' claim to lost profits in the life settlement secondary market further contributes to a predominance of individual, not common, issues. "[W]hile the fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification, it is nonetheless [another] factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues." *McLaughlin*, 522 F.3d at 231 (internal citations omitted).

As the Court found in its May 2, 2012 order partially dismissing the Complaint (at page 22), the Trustees allege that the rate adjustments "damaged the resale value of the policies" in the life settlement secondary market. Determining diminished "resale value," however, necessitates policy-by-policy valuations, all subject to expert proof and debate.[5] To assess a universal life policy's "resale value," the appraiser would need to account for, among other things, the COI charge particular to each policy, the policy's ownership structure, the insured's life expectancy, and the policy's maturity date. *See generally* Dan Zollars *et al.*, *The Art of the Deal: Pricing Life Settlements*, Contingencies, Jan.-Feb. 2003, at 34-37, *available at* http://www.contingencies.org/

---

[5] To the extent the Trustees no longer seek "resale value" damages, "a serious question of adequacy of representation arises when the class representatives profess themselves willing … to assert on behalf of the class only such claims" most amenable to class certification. *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982). Tailoring "the class claims in an effort to improve the possibility of demonstrating commonality" comes "at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action." *Id.* The Trustees' abandonment of the "credited interest rate" claim, *see* Compl. ¶ 47(e), exemplifies the inadequacy of their representation.

janfeb03/art.pdf. "With universal life contracts, the costs and benefits may be difficult to assess due to their numerous components and highly flexible structure. Therefore, each of the unique policy elements must be accurately quantified." *Id.* at 35.

Class treatment "may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003). Here, the Trustees offer *no* formula by which to ascertain "resale value" damages. Courts deny class certification where, as here, assessing damages will depend on varying market prices, *see Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (concluding that a "serious problem of manageability relates to damages" because the factfinder would need to determine "the amount by which [each class member's] payment exceeded the prices that would have prevailed in a free market"), or on individualized claims for lost profits, *see Bell Atl.*, 339 F.3d at 306-08 (concluding "that the issue of damages defeats predominance" because any "reasonable approximation of the damages actually suffered by the various class members would instead require a much tighter inquiry into the nature of the class member businesses").[6]

B. A Class Action Is An Inferior Means Of Adjudicating The Controversy.

For a variety of reasons, the Trustees further fail to establish Rule 23(b)(3)'s requirement that a class action be the superior means of adjudication.

First, the nature and size of the putative class members' individual claims indicates the strength of their interest and capacity for separate litigation. *See* Fed. R. Civ. P. 23(b)(3)(A). Rule 23(b)(3) was intended to provide "small claimants with a method of obtaining redress for

[6] The Supreme Court is now considering a petition presenting the following question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Comcast Corp. v. Behrend*, 133 S. Ct. 24 (2012).

claims which would otherwise be too small to warrant individual litigation." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968). That purpose is not served where, as here, the putative class members are all owners of million dollar-plus life insurance policies capable of paying large premiums, including many sophisticated life settlement investors or their nominees, which assert large claims (including claims for lost profits) and possess the resources to pursue their own suits. The Trustees themselves contend that "[t]he amount of COI increases at issue in this case are *staggering*." Compl. ¶ 8 (emphasis added).

> For a PAUL policy with a $10 million face value, Phoenix increased annual COI charges by $76,800 during the first year the increase was in effect, $46,700 the second year, $30,500 the third year, $30,300 the fourth year, $17,300 the fifth year, $16,500 the sixth year, and so on.

Id. Moreover, the COI charges themselves are only a part of this suit's stakes, since policyowners want to avoid Phoenix's supposed attempt to "induce lapses of surrenders of policies," *id.* ¶ 7; *see also* Pls.' Opp. to Mot. to Dismiss at 27 (alleging that the rate adjustments "forced consumers to choose whether to pay higher premiums in the future or lapse"), all of which have face amounts of or exceeding $1 million. O'Connell Decl. ¶¶ 9, 35.[7]

"When the size of each claim is significant, and each proposed class member therefore possesses the ability to assert an individual claim, the goal of obtaining redress can be accomplished without the use of the class action device." *Stoudt v. E.F. Hutton & Co.*, 121 F.R.D. 36, 38 (S.D.N.Y. 1988) (class not superior where class members each had claims worth $60,000); *see also Kottler v. Deutsche Bank AG*, No. 05 Civ. 7773, 2010 WL 1221809, at *5 (S.D.N.Y. Mar. 29, 2010) (class not superior where class members "are high net-worth investors with large claims"); *Steinmetz v. Bache & Co.*, 71 F.R.D. 202, 205 (S.D.N.Y. 1976) (class not

[7] When potential policy lapse is at issue, courts recognize that the amount in controversy is the face amount of the policy's death benefit. *See, e.g.*, *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 835 (8th Cir. 2003).

superior where claims for $5,000 were sufficient to incentivize individual suits). Indeed, two institutional owners of policies issued by Phoenix's affiliate have filed their own COI rate suits: *U.S. Bank* and *Tiger Capital, LLC v. PHL Variable Insurance Co.*, No. 12 Civ. 2939.

The Trustees offer no evidence or record citation whatsoever that policyowners' interests are too small to bring individual actions. *See* Pls.' Memo. at 23. Nor do the Trustees assert that, or explain how, they have been impeded from obtaining such evidence in discovery. Yet the burden to provide such *evidence* rests squarely with them, not with Phoenix. *See Dunnigan v. Metro. Life Ins. Co.*, 214 F.R.D. 125, 142 n.15 (S.D.N.Y. 2003) ("Dunnigan has offered no *evidence* of the amount of interest she claims is due to putative class members. Without such *evidence*, the Court cannot find that the class members' interests are too small to bring individual actions for unpaid interest.") (emphases added).

The Trustees do make much of the fact that this suit has been heavily litigated, arguing that "few if any class members could afford on their own to seek legal redress for Phoenix's actions, especially against a defendant with such extensive resources to litigate." Pls.' Memo. at 23. That misses the point. The heavy lifting has *already* occurred, and the Court has ordered here that the fruits of discovery can be shared with plaintiffs asserting related claims. *See also Weiss v. La Suisse*, 381 F. Supp. 2d 334, 342 n.6 (S.D.N.Y. 2005) (discovery in one case deemed to be discovery in related case).[8] This Court also has recognized that individual litigation offers policyowners a risk-free choice, observing that "you'll get all the benefit of the litigation that goes on here, and if PHL [or Phoenix] loses, lucky you. You'll win – may well win without having to do any work." Sklaver Decl. Ex. T at 8:6-10.

[8] It is curious that the Trustees point to the cost to Phoenix of their nearly unbounded discovery, Pls.' Memo. at 4 n.4, but they have *collectively* produced only around 1,000 pages of material.

Second, the Court should consider "the extent and nature of any litigation concerning the controversy already begun by or against class members," Fed. R. Civ. P. 23(b)(3)(B), and "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(C). Superiority "is lacking where [a] judicial management crisis does not exist and individual trials are possible." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).[9] Conserving judicial resources through the class device is doubtful given the lack of factual support for the Trustees' suggestion that breach of contract claims against Phoenix will congest the court system. *See* Pls.' Memo. at 4, 24. Nearly three years after the initial COI rate adjustment was announced, no such lawsuits have been filed. O'Connell Decl. ¶ 46. (As noted, two suits with counts for contract breach, *U.S. Bank* and *Tiger Capital*, have been filed against Phoenix's affiliate.) "Until plaintiffs decide to file individual claims, a court cannot, from the existence of injury, presume that all or even any plaintiffs will pursue legal remedies. Nor can a court make a superiority determination based on such speculation." *Castano*, 84 F.3d at 748.

In addition, individual trials are both possible and desirable. Indeed, this Court has already proven that it can capably manage – without certifying a class – a trial on the individual claims of some 40 life insurance policyowners that the defendant life insurer breached their policies' terms. *See Weiss*, 226 F.R.D. at 448 (describing prior trial of contract claims and denying class certification of similar claims). Any procedural advantages associated with class litigation can be replicated through other techniques, such as consolidating discovery relating to the purported contract breaches, *see Blyden v. Mancusi*, 186 F.3d 252, 271 (2d Cir. 1999), consolidating the trial, *see Weiss*, 226 F.R.D. at 448, or both.

---

[9] As one treatise states, "the *lack* of large numbers of parallel, individual suits may weigh against the superiority of a class action as well, because the lack of other suits serves as an indicator of the lack of any 'judicial crisis' mandating class treatment in order to preserve judicial resources." 5 James Wm. Moore *et al.*, *Moore's Federal Practice* § 23.46[2][c] (3d ed. 2012).

Third, the lack of predominating common issues highlights the inevitable difficulties of managing the two classes proposed here. *See* Fed. R. Civ. P. 23(b)(3)(D). "Here, as noted, the need for mini-trials on the resolution of each class member's claims and the applicability of affirmative defenses detracts from the superiority of the class action device, to say the least." *Spagnola*, 264 F.R.D. at 99; *see also Dunnigan*, 214 F.R.D. at 142.

IV. The Rule 23(a) Criteria Are Not Met.

A. Serious Intraclass Conflicts Render The Named Plaintiffs Neither Typical Of Putative Class Members Nor Adequate To Represent Them.

The Trustees further fail to meet Rule 23(a)'s requirements. It may be that policyowners dislike Phoenix's right to periodically revise COI rates, but the Trustees offer no evidence that putative class members would prefer a judgment adopting the Trustees' interpretation of the policies' rate adjustment provisions to a judgment approving the company's interpretation. That is because owners of in-force PAUL policies within the proposed classes remain subject to Phoenix's right to revise its COI rates, including any "re-do" of the rate adjustments. This suit's challenge is not to Phoenix's contractual right to adjust rates; the challenge is to the company's methodology in doing so. *See* Compl. ¶ 9. As explained in the French Declaration, however, a COI rate adjustment adhering to the Trustees' methodology likely would place many policyowners in a *worse* position than they are under the current rates. *See* French Decl. ¶¶ 32-40. The Trustees thus stand in a position that is antagonistic to many putative class members.

There are multiple such intraclass conflicts. *First*, at least 17 policies (out of 108) received a COI rate *decrease* because of the second rate adjustment. Owners of these policies benefited from the company's actions. The Trustees' demand to rescind the current COI rates would necessarily result in higher charges and adversely impact these putative class members which were "subjected to" the second rate adjustment. *See id.* ¶ 33.

Second, any modifications to the method used to apply the COI rate adjustments would result in some putative class members having higher COI charges under the Trustees' methodology while other putative class members would see decreases in their charges. For example, if the Trustees were to propose that all putative class members have the same average COI percentage increase as opposed to having the COI adjustments implemented by Phoenix, then those putative class members which originally had an increase that was less than the group average would see an increase in their COI charges as a result of the Trustees' proposed methodology. Putative class members which had an original increase that was larger than the group average would see a decrease in their charges. *See id.* ¶¶ 35-37.[10]

Third, the Trustees' expert's suggestion that Phoenix could have used other methods to reflect the policies' experience again illustrates that putative class members' interests are not aligned. For example, he states that [redacted] *See* French Decl. ¶¶ 38-40.[11]

[10] To illustrate this point further, if instead of implementing the second COI rate adjustment as it did in November 2011, Phoenix had decided to increase the COI rates 17% for every policy, then those putative class members that had an original increase of 10% would now be harmed under the alternate methodology (17% increase versus 10% increase) and those putative class members with an original increase of 20% would benefit. French Decl. ¶ 36.

[11] For example, a policyowner who bought the policy for "traditional" reasons may have an account value of $50,000 while investors which minimally funded their policies would have an account value close to $0. For each 1% decrease in the credited interest rate, the "traditional" owner would receive $500 less of credited interest while the investor would have almost no decrease (since there is no account value). *Id.* ¶ 39.

Such conflicts are anathema to class certification. "Inherent in any class action is the potential for conflicting interests among the class representatives, class counsel, and absent class members." *Maywalt v. Parker & Parsley Petrol. Co.*, 67 F.3d 1072, 1077 (2d Cir. 1995). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* at 626 n.20 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). "The ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court." *Maywalt*, 67 F.3d at 1078.

Classes divided among "winners" and "losers" cannot stand. A recent decision denying class certification of a COI rate lawsuit illustrates this neatly. In *Thao v. Midland National Life Insurance Co.*, the plaintiff sought to represent a class of universal life policyowners. No. 09 Civ. 1158, 2012 WL 1900114, at *1 (E.D. Wis. May 24, 2012). Similar to the Trustees in this case, the *Thao* plaintiff alleged a contract breach because the defendant life insurer set its COI rates inconsistent with policy language supposedly requiring the insurer to consider nothing other than factors listed in the policy relating to mortality expectations. *Id.* at *3.[12] The *Thao* plaintiff's interpretation of the policy created an intraclass conflict:

[12] The *Thao* court recently rejected the plaintiff's policy interpretation on its merits. *See Thao v. Midland Nat'l Life Ins. Co.*, No. 09 Civ. 1158, 2012 WL 119871 (E.D. Wis. Jan. 9, 2013).

> [T]here is likely a single answer for all policyholders: either the policies allowed Midland to consider factors unrelated to mortality expectations when setting its cost-of-insurance rates, or they did not. However, it does not follow that this case is appropriate for class treatment. This is so because, as we will see, the class members may not agree on what the answer to the common question should be. Some class members might prefer rates that are not based exclusively on mortality expectations, while other class members might, like Thao, prefer rates that are based exclusively on mortality expectations.

Id. Since "the class contains many policyholders who would prefer Midland's interpretation of the policy to Thao's," the motion for class certification was denied. *Id.* at *10; *accord Duchardt v. Midland Nat'l Life Ins. Co.*, 265 F.R.D. 436, 449-51 (S.D. Iowa 2009) (in action challenging life insurer's interest crediting methodology, adequacy not met where some policyowners would benefit by the insurer's method, creating "obvious conflicts between the 'winners' and 'losers'"). The Trustees' motion likewise should be denied on this basis.[13]

---

[13] The Trustees rely heavily on two cases, *In re Conseco Life Insurance Co. LifeTrend Insurance Sales & Marketing Litigation*, 270 F.R.D. 521 (N.D. Cal. 2010), and *In re Conseco Life Insurance Co. Cost of Insurance Litigation*, No. 04 ML 1610, 2005 WL 5678842 (C.D. Cal. Apr. 26, 2005). Neither of those cases address or concern the sort of serious intraclass conflicts that precluded class certification in *Thao* and that should likewise preclude certification here. Rather, the *Conseco* cases involved life insurance policies, unlike here, which allowed *only* consideration of mortality experience; the allegations were that the rate increases had nothing to do with that factor. If the *Conseco* plaintiffs proved their allegations, *no* basis for any increase would exist. This case, in contrast, hinges on the methodology for allocating rate adjustments under the policies' multiple pricing factors. As corroborated by the Department's acceptances of Phoenix's rate adjustments, there is a strong basis justifying the changes, unlike the record in the *Conseco* cases.

The *Conseco* cases are distinguishable for other reasons. Neither of those cases address or concern any of the other objections raised here: the inclusion of uninjured class members within the class definitions, the practicability of joinder of small groups of sophisticated life settlement investors with large claims, the individualized nature of acquiescence-based defenses and complex secondary market damages, and the superiority of individual litigation. The Trustees also neglect to inform the Court that both of the *Conseco* cases they cite were certified under the inapposite Rule 23(b)(2), not Rule 23(b)(3).

B. Joinder Of The Two Proposed Classes' Members Is Not Impracticable.

The Trustees also do not satisfy Rule 23(a)(1), which requires that the Trustees show that each of the two putative classes are, independently, so numerous that joinder of all members is "impracticable." Approximately 58 policyowners currently hold the 124 policies within the first rate adjustment class; approximately 72 policyowners currently hold the 104 policies within the second rate adjustment class. O'Connell Decl. ¶¶ 22, 44.

The Court has indicated that it follows a presumption that 40 class members satisfy the numerosity requirement. But numerosity "requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of Northwest v. EEOC*, 446 U.S. 318, 330 (1980). Thus, no "magic" number establishes numerosity, *Deen v. New Sch. Univ.*, No. 05 Civ. 7174, 2008 WL 331366, at *2 (S.D.N.Y. Feb. 4, 2008), and courts routinely reject as not "numerous" proposed classes that far exceed 40 members. *See, e.g.*, *Abu Dhabi Comm'l Bank v. Morgan Stanley & Co.*, 269 F.R.D. 252, 257-59 (S.D.N.Y. 2010) (proposed class of over 100 members held not numerous); *Deen*, 2008 WL 331366, at *3-5 (same; 110 members); *Primavera Familienstiftung v. Askin*, 178 F.R.D. 405, 410-11 (S.D.N.Y. 1998) (same; 118 members); *Block v. First Blood Assocs.*, 691 F. Supp. 685, 695 (S.D.N.Y. 1988) (same; 57 members).

More than raw numbers, the numerosity inquiry focuses on whether joinder of the putative class members is practicable. *See* Fed. R. Civ. P. 23(a)(1). In deciding that, courts in this Circuit consider the (1) "judicial economy arising from the avoidance of a multiplicity of actions"; (2) "financial resources of class members"; (3) "ability of claimants to institute individual suits"; (4) "requests for prospective injunctive relief which would involve future class members"; and (5) "geographic dispersion of class members." *Abu Dhabi Comm'l Bank*, 269 F.R.D. at 255. An analysis of these factors weighs against a finding of numerosity here.

First, the Trustees "fail to show why class certification as opposed to joinder would better serve the interests of judicial economy in avoiding a multiplicity of actions. Plaintiffs have failed to establish that a consolidated action 'would be somehow less efficient than class certification in resolving this dispute.'" *Id.* (quoting *Deen*, 2008 WL 331366, at *3). As noted above, this Court has already capably managed – without certifying a class – a trial on the claims of some 40 individual life insurance policyowners. *See Weiss*, 226 F.R.D. at 448.

Second, the Trustees offer no evidence that putative class members lack the resources to participate in this or any other litigation. Indeed, all indications are to the contrary. In 2010 alone, the Loeb Trust paid over $1 million in premium on the Loeb policy. The Trustees allege that the two proposed classes are comprised of sophisticated "life settlement investors, or trustees with known connections to life settlement investors." Compl. ¶ 33. Such policyowners or their principals – hedge funds, corporations, banks, life settlement providers, or life settlement trustees, *see* O'Connell Decl. ¶ 45 – are unlike the members of other classes where certification was necessary to vindicate a claim that would otherwise go unvindicated; "'this is not a situation where the class members are incarcerated, unsophisticated, or elderly.'" *Deen*, 2008 WL 331366, at *4 (quoting *Ansari v. N.Y. Univ.*, 179 F.R.D. 112, 115 (S.D.N.Y. 1998)). "Under these circumstances, the principle of protection for weaker plaintiffs which underlies Rule 23 cannot be invoked, nor can joinder be said to be impracticable." *Primavera*, 178 F.R.D. at 411.

Third, for the same reasons, putative class members plainly possess the motive and opportunity to commence their own individual lawsuits. The amounts at issue are, by the Trustees' own characterization, "staggering." Compl. ¶ 8. Moreover, policyowners can easily band together in litigation without a class being certified.

Fourth, the Trustees do not request injunctive relief that would involve future class members. The only injunction sought in the Complaint's Prayer for Relief was in connection with the now-dismissed claim alleging violations of New York's General Business Law § 349.

Fifth, although the proposed classes may be geographically dispersed, "dispersion is not dispositive." *Ansari*, 179 F.R.D. at 115. Moreover, any additional breach of contract lawsuits that may be commenced against Phoenix would need to be filed in New York. No other forum can properly lay claim to personal jurisdiction over the company. A New York life insurer, "Phoenix sells life insurance in the State of New York only" and "all of the policies at issue in this litigation were issued, or issued for delivery, in the State of New York." Compl. ¶ 14.

CONCLUSION

The Trustees fall far short of satisfying their heavy burden of proving the need for a class under the "rigorous analysis" demanded by Rule 23. Accordingly, for all the foregoing reasons, Phoenix respectfully requests that the Court enter an order denying the Trustees' motion for class certification.

Dated: New York, New York
February 1, 2013

DORSEY & WHITNEY LLP
Patrick J. Feeley (PF-4931)
Jonathan R. Montcalm (JM-8866)
51 West 52nd Street
New York, New York 10019
(212) 415-9200

- and -

JORDEN BURT LLP
By: /s/ Waldemar J. Pflepsen Jr.
Waldemar J. Pflepsen Jr. (*pro hac vice*)
Stephen J. Jorden (SJ-5009)
Jason H. Gould (JG-2012)
Brian P. Perryman (*pro hac vice*)
1025 Thomas Jefferson Street NW
Suite 400 East
Washington, DC 20007
(202) 965-8100

Attorneys for Defendant
Phoenix Life Insurance Company